STATE OF MICHIGAN

COURT OF APPEALS

GLEN A. MAYLE, SR., Next Friend of GLEN A. MAYLE, JR., a Minor,

Plaintiff-Appellee,

v

LAWRENCE FULLER and EMMA FULLER,

Defendants-Appellants,

and

TIM FULLER and MARJORIE FULLER,

Defendants.

UNPUBLISHED
October 8, 1999

No. 210589
Saginaw Circuit Court
LC No. 94-004943 NO

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald*, JJ.

PER CURIAM.

This case arose when five-year-old Glen A. Mayle, Jr. (hereinafter referred to as "plaintiff") was bitten by a dog owned by Tim and Marjorie Fuller, on property allegedly under the control of Tim Fuller's parents, defendants Lawrence and Emma Fuller. Prior to trial, the suit against Tim and Marjorie Fuller was severed from the suit against Lawrence and Emma Fuller, and the trial proceeded against the latter under a theory of premises liability. A jury found in favor of plaintiff, awarding $160,000 in damages. Defendants now appeal as of right. We reverse.

I

Tim and Marjorie Fuller rented a home next to, and owned by, Lawrence and Emma Fuller. The two houses were situated only a few yards apart, with no clear delineation between the lots. Both couples commonly used both properties. Lawrence and Emma also owned a larger piece of unimproved property directly behind the two houses, referred to as the "shale pile" throughout the lower court proceedings. The rental agreement between the Fullers was not reduced to writing, and

* Former Supreme Court Justice sitting on the Court of Appeals by assignment.

there was no express agreement regarding which portions of Lawrence and Emma's three properties Tim and Marjorie were entitled to use in return for their rent payment. There was no dispute that Lawrence and Emma retained considerable control over all three parcels.

Tim and Marjorie Fuller's dog was chained to a dog coop in the shale pile area on the day plaintiff was injured. It is undisputed that there is no evidence of any prior vicious tendencies displayed by the Fullers' dog. Tim Fuller had been supervising his daughter and plaintiff while they played in the yard. He went inside after sending plaintiff home, but did not realize plaintiff had returned to play. The children saw something shiny near the dog coop and proceeded to investigate. Even though plaintiff and other children had been repeatedly warned to stay away from the dog, plaintiff went into the area surrounding the dog coop where the dog proceeded to bite plaintiff on several areas of his body, particularly his face, which caused serious injuries.

II

Defendants argue that the trial court erred in denying their motion for summary disposition. We agree. This Court reviews the grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 672 NW2d 201 (1998); *Meahger v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). A motion for summary disposition filed pursuant to MCR 2.116(C)(10) may be granted only when there is no genuine issue of material fact, and the moving party is therefore entitled to judgment as a matter of law. *Spiek, supra* at 337.

Plaintiff's amended complaint set forth two claims: (1) negligence based on a keeper or caretaker theory of liability; and (2) premises liability. A prima facie case of negligence based on temporary control as a caretaker of an animal requires a showing that defendants either knew or should have known of the animal's vicious or dangerous propensities, and that the duty to protect against that foreseeable harm was breached. *Trager v Thor*, 445 Mich 95, 106; 516 NW2d 69 (1994). The *Trager* Court applied the following standard of care to non-owner caretakers of animals:

> [A] negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen. [*Trager, supra*, at 106.]

In this case, defendants may have maintained control over the premises, but there was no evidence to suggest that defendants had temporary control of the dog. In fact, defendants were at work at the time plaintiff was bitten by the dog. Moreover, even if it could be established that defendants were caretakers of the dog, it is undisputed that the dog had never bitten anyone previously and had been nothing but friendly with people.

Because the dog showed no prior vicious tendencies, we cannot conclude that plaintiff's injuries could have been reasonably foreseeable to defendants. Therefore, we find that the trial court erred in denying defendants' motion for summary disposition as to the negligence claim.

Likewise, we find that summary disposition should have been granted on plaintiff's premises liability claim. In *Preston v Sleziak*, 383 Mich 442, 451-453; 175 NW2d 759 (1970), the Court set forth the duty owed by a possessor of land to social guest licensees:

> The duty which occupiers of land owe their licensees is best expressed by 2 Restatement of Torts (2d), § 342, p 210:
>
> "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an *unreasonable risk of harm* to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved." (emphasis added).

Premises liability is conditioned upon the presence of both possession and control over the premises. *Kubczak v Chemical Bank and Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). Although defendants contend that they did not possess the land because they had rented it to codefendants, there was evidence presented to create a question of fact as to whether defendants maintained joint possession and control over the property.

However, even assuming that defendants did have possession and control over of the land, we find that there was no evidence to create a question of fact as to whether defendants knew or should have known that the dog posed an unreasonable risk of harm to plaintiff.

Michigan courts have been hesitant to impose a duty upon non-owners who have no prior knowledge of the dog's vicious nature. In *Szkodzinski v Griffin*, 171 Mich App 711, 714; 431 NW2d 51 (1988), this Court declined to impose common law liability upon a landlord for injuries caused by a tenant's dog where the landlord did not know of the dog's vicious nature. Similarly, in *Feister v Bosack*, 198 Mich App 19, 26; 497 NW2d 522 (1993), the Court took the *Szkodzinski* ruling one step further in finding that a landlord has no duty to inspect the premises to discover a tenant's dangerous animal.

Plaintiff contends that defendants need not have known the dog was dangerous to support a finding of premises liability. Plaintiff relies upon the holding in *Klimek v Drzewiecki*, 135 Mich App 115; 352 NW2d 361 (1984) to support this contention. The *Klimek* Court held:

> We hold that a loose, unsupervised and dangerous dog either on defendant's land or in close proximity to defendant's land without any obstacle to prevent it from entering defendant's land is a "condition on the land" as that term was used in *Preston*

> [, *supra*] and the Restatement. Defendant Drzewiecki therefore owed to plaintiff and her child the duty specified in 2 Restatement Torts, (2d), § 343, p 210. [*Id.* at 119.]

In *Klimek*, the defendant knew that his neighbor's dog was loose and unsupervised and had previously bitten someone. In this case, it is undisputed that the dog had never bitten anyone previously and had always been friendly with people. Additionally, the dog was properly restrained on defendants' property in accordance with local ordinances at the time plaintiff was attacked. Therefore, we find this case to be factually distinguishable from *Klimek*.

Plaintiff also contends that defendants' warnings to neighborhood children to stay away from the dog is evidence sufficient to create a genuine and material question whether defendants knew or should have known that the dog constituted an unreasonably dangerous condition on the land. We disagree. Just because defendants exercised extra caution by warning children to stay away from the dog does not mean that it was foreseeable that the dog would viciously attack plaintiff. Our Supreme Court has held that, under normal circumstances, a domesticated dog does not pose an unreasonable risk. *Trager*, *supra* at 105. Imposing liability merely because defendants warned children to stay away from the dog, without showing that the dog had exhibited vicious tendencies in the past, would serve to discourage people from exercising general cautionary measures when young children are near dogs. A cautious dog owner should not be subject to liability merely because he recognizes that even the most tame of domesticated animals might attack if provoked or that a large dog might cause a child injury merely by knocking the child down.

Because plaintiff failed to produce evidence that defendants had knowledge that the dog previously displayed vicious tendencies, we find that reasonable minds could not conclude defendants knew or should have known that the dog posed an unreasonable risk of harm to plaintiff. Therefore, we find that the trial court erred in denying defendants' motion for summary disposition as to the premises liability claim.

Judgment in favor of plaintiff is vacated and this case is remanded for the entry of an order granting summary disposition. In light of our decision, we need not address defendants' remaining appellate arguments.

The judgment for plaintiff is vacated and this case remanded for entry of a judgment of no cause of action. We do not retain jurisdiction.

/s/ Donald L. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ John W. Fitzgerald